

Safety Considerations for Family Law Mediators

BY HARRIET E. CUMMINGS, ESQ.

We live in an increasingly violent society. Legal disputes are not immune from the threat of violence; the number of case-related violent incidents has increased dramatically in recent years.¹ Court-related proceedings, including mediation, can be potentially significant stressors that carry with them an inherent risk for violence. For this reason, one of the most important factors contributing to a successful mediation is that the parties feel safe, because if a mediator can't build at least some level of trust between the parties, they will be unable to resolve their conflict. To ensure participants' safety, there are numerous factors to take into consideration. These include:

Consider the Type of Case

Cases in the family law arena are the first that come to mind as having the potential for violence in mediation, because there is often a strong emotional component to them. This can be said as well of cases in which one's livelihood feels threatened, medical malpractice or wrongful death cases, or disputes involving homeowners or between family members.

Consider Who May be Affected

Any participant in the process is potentially at risk of harm in mediation. This can include the mediator, the parties, the attorneys, non-parties, support staff and innocent bystanders. Even if not the intended targets, any or all of these may be harmed if a mediation erupts in violence.

Consider the Individual Participants

Regardless of the type of case involved, the emotional impact of a case depends on the individual participants' perceptions and beliefs. There are numerous inhibitors that prevent most people from acting out, including stable employment, respect for authority and strong family support.² The fewer of these in place, the greater the likelihood of violence when faced with a highly charged emotional event.

Consider the Multiple Forms of Violence

It is important for mediators to recognize that violence can take many forms. Physical violence is the most obvious, but particularly in the family law context, violence can also consist of emotional abuse, sexual exploitation, verbal abuse and other means of manipulation aimed at eliciting fear and exerting control.

Consider Verbal and Non-Verbal Cues

Someone screaming loud obscenities and pounding their fists on the table is an obvious cue that safety may be at issue. But there may be other, more subtle cues that inform an alert observer that trouble may be brewing. These may include a glaring look, face turning red, clenched hands or teeth, use of critical or confrontational language, or a shift in overall demeanor.

Consider Potential Triggers

Some parties have unrealistic expectations or beliefs about their case or the outcome of mediation. Sometimes, a single comment or gesture in mediation may trigger an outburst that is intense but short-lived. Other times, anger may build slowly over time and, even when it boils over, may not dissipate. To bring the parties to a more realistic perspective and prevent the situation from escalating, the

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mediator can gradually break the dispute down into smaller components and address them sequentially. The mediator can also help the parties name their negative emotions and ask them to summarize the issues from the opposing point of view. These techniques can bring parties back into balance, leading to a more reasoned response instead of violence.

Consider the Parties' History

Mediators should inquire about the parties' past relationships to determine whether there is any potential for violence at the mediation. The mediator should determine whether there are any protection orders in effect, whether there are any current allegations of violence and whether there has been any violence between the parties in the past. The mediator can also use screening tools, such as intake forms or questionnaires, for the parties to complete prior to their first appointment.

Consider Potential Power Imbalances

The typical mediation model presumes that the parties have equal power in the process. However, especially in instances where there has been domestic violence, there may be an imbalance of power resulting from fear that inhibits one or more parties' decision-making process. A mediator should be on the lookout for such imbalances throughout the process.

Consider Potential Cultural Differences

Cultural differences can lead to communication problems, resulting in misunderstandings that could trigger potential violence. Culture is influenced by many factors, including geography, politics, economics, religion, ethnicity, workplace and family. It affects how participants view the nature of the conflict and their approach to mediation. To prevent a clash of core values from leading to unnecessary escalation of the

conflict between the parties, it is important for the mediator to be culturally aware and to search for ways to bridge any culture gap.³

Consider Individual Perceptions, Attitudes and Personal Biases

The mediator should consider how participants' attitudes toward mediation influence their perception of it. Many parties presume that their opponents have bad intentions, malicious motives, are unreasonable and bear them ill-will, but these assumptions are not necessarily true; there may be a more benign explanation for their behavior. In addition, we all have our own personal biases that, regardless of how open-minded and well-intentioned we think we are, may contribute to a negative outcome or experience in mediation.

Consider the Location

If a mediator has any concerns regarding potential violence, the mediation should be held in a secure location. For example, courthouses have armed officers operating magnetometers, wands and/or x-ray machines. Private office buildings may have door or window alarms, security cameras or duress alarms, as well as security guards patrolling the halls and/or outdoor parking areas. The mediator should be aware of where emergency exits are located, know whether the area outside the building is well lit and consider whether parties may need to be escorted to their vehicles following mediation.

Consider the Parties' Arrivals, Wait Times and Departures

To protect parties from violence before and after the mediation, the mediator should consider staggering arrival and departure times, and recommend they park in separate areas. The mediator can also have them sit in separate waiting rooms, and use different entrances and exits if possible. These considerations are especially important in cases with a past history of violence.

Consider the Room

Another safety consideration is the room where the mediation will be held. Does it have more than one exit? If there are windows, can they be closed to outside views? Is the room so crowded with furniture that it is difficult to move around? Does the room contain small objects that could be turned into makeshift weapons?

Consider Where Participants Sit During Mediation

Psychogeography is the study of how the physical environment of a particular location influences the mind or individual behavior. In mediation, this translates into factors such as considering the shape of the table, or where the parties sit.⁴ The mediator should consider having assigned seats at the table, so that the mediator can take steps to reduce friction. Participants who sit directly across from each other are less likely to clash than participants who sit crisscross from each other.⁵ Participants who sit next to the mediator are more likely to feel secure than those sitting further away, which is important in instances where there is a significant power imbalance.⁶ Consider who should sit closest to the door and whether it is safe for anyone to have their back to a window or a doorway.

Consider the Ground Rules

The mediator should consider setting ground rules designed to minimize escalation of emotions during the mediation. These can include requiring participants to act with civility and respect, or restricting certain "hot button" discussion topics whose resolution is not required to mediate the case but which serve as emotional triggers. By setting the rules, the mediator can create an expectation of cooperation and safety.

Consider Taking a Breather

If the discussion gets heated during mediation, the mediator should consider taking a break. Giving participants a chance to get hydrated, eat a snack, use the restroom or get some fresh air can give everyone an opportunity to calm their emotions and refocus.

Consider Alternatives to Face-to-Face Mediation

Caucuses in which the mediator meets with the parties separately may be a good alternative in cases involving a potential for violence. Another alternative is shuttle

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mediation, in which the mediator moves back and forth while the parties remain in separate rooms. It may even be necessary to meet with the parties on different days. Mediation by telephone is usually disfavored, but may be a viable last resort if safety is of concern.

Conclusion

There are many factors to consider when it comes to safety in the mediation process. Participants need to feel not just physically safe, but also psychologically safe. The job of the mediator is to recognize and manage the veil of intense emotion that so often overshadows conflict, particularly in family law. Ensuring the safety of mediation

participants preserves the integrity of the process and increases the likelihood of a successful outcome. However, if after taking all reasonable precautions, the risk of violence is still too high, the mediator should consider recommending that the mediation not take place. Factors such as a significant history of domestic violence may be impediments to mediation that simply cannot be managed or overcome.

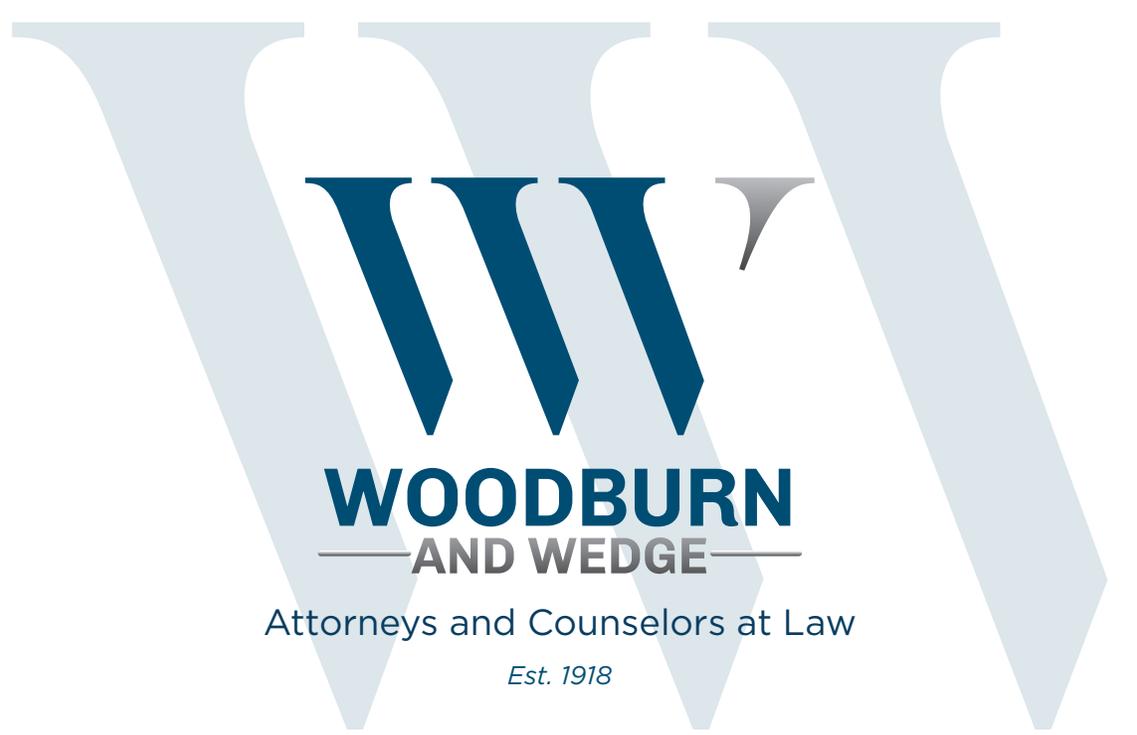
Fortunately, in most cases, violence or the threat of violence does not enter the picture. But even a single instance of a mediation ending in violence is one too many. That is why it is so important for mediators to be attuned to the potential for violence, and to take prompt steps to eliminate or minimize the threat. To quote Chief Daryl Keithley of the Nevada Supreme Court Marshal's office, "it is far better to prevent any violence from happening in the first place than to have to deal with its tragic consequences after the fact." **NL**

1. Timm Fautsko et al., *Courthouse Security Incidents Trending Upward: The Challenges Facing State Courts Today*, FUTURE TRENDS IN STATE COURTS, 102 (National

Center for State Courts, 2012), <https://cdm16501.contentdm.oclc.org/digital/collection/facilities/id/163>.

2. See *id.* at 103.
3. See *Overcoming Cultural Barriers in Negotiations and the Importance of Communication in International Business Deals*, HARV. L. SCH. PROG. ON NEGOT. DAILY BLOG 2 (July 15, 2019), <https://www.pon.harvard.edu/daily/international-negotiation-daily/bridging-the-cultural-divide-in-international-business-negotiations>.
4. See Nancy Neal Yeend, *Psychogeography and Mediation*, PLAINTIFF MAG. 36 (September 2015), <https://www.plaintiffmagazine.com/recent-issues/item/psychogeography-and-mediation>.
5. See *id.* at 40.
6. *Id.* at 39.

HARRIET E. CUMMINGS serves as chief assistant Clerk of Court to the Nevada Supreme Court and as legal advisor to the Supreme Court's Civil Settlement Program. She would like to thank Elizabeth Brown, Esq., Clerk of Court; Shaunna Troop, Settlement Program Administrative Coordinator; and Sally Williams, Deputy Clerk, for their editorial assistance.



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